A

MUHAMMAD JAILANI KASIM

v.

TIMBALAN MENTERI KESELAMATAN DALAM NEGERI, MALAYSIA & ORS

B

FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
ALAUDDIN MOHD SHERIFF FCJ
AUGUSTINE PAUL FCJ
C [CRIMINAL APPEAL NO: 05-34-2006 (J)]
27 JULY 2006

PREVENTIVE DETENTION: *Detention order - Application for habeas corpus - Irregularities in making of detention order - Whether any*
D *statutory pre-condition to making or leading to making of detention order could not be inquired into - Whether non-compliance of such requirements constituted a breach - Whether subject to judicial review - Whether detention order had not been validly made - Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 5, 6(1)*

E

CRIMINAL PROCEDURE: *Habeas corpus - Preventive detention - Irregularities in making of detention order - Whether any statutory pre-condition to making or leading to making of detention order could not be inquired into - Whether non-compliance of such requirements constituted a*
F *breach - Whether subject to judicial review - Whether detention order had not been validly made - Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 5, 6(1)*

The appellant was arrested pursuant to s. 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act') and the
G Deputy Minister of Internal Security ('Minister') issued a detention order against the appellant under s. 6(1) of the Act. The writ of *habeas corpus* filed by the appellant was dismissed by the High Court, resulting in the present appeal. In *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors,* this court
H held that a writ of *habeas corpus* must be directed against the current detention order when it has been made subsequent to a prior arrest and detention. Thus, any illegality in the prior arrest and detention cannot be the subject matter of inquiry. The critical issue that arose for determination in this appeal was whether such
I a result would also extend to any irregularities in the making of the current detention order, or in other words, whether any statutory pre-condition to the making or leading to the making of

the current detention order could not be inquired into just as in the case of irregularities in the prior arrest and detention. The appellant argued that there was no material evidence on record to show the qualification of the Inquiry Officer ('IO') as prescribed by the proviso to s. 5(1) of the Act and neither was there any evidence to show that the IO carried out the investigation as required of him. He did not affirm any affidavit to explain the part played by him. In his reply, the learned Deputy Public Prosecutor ('DPP') said that para. 6 of the affidavit of the Minister showed that the IO had indeed prepared the report as required by s. 5 of the Act. He added that in view of the judgment of this court in *Mohd Faizal (supra)*, any defect in the report of the IO or in his qualification was not a relevant matter for consideration.

Held (allowing the appeal)
Per Augustine Paul FCJ:

(1) It is not mandatory for the IO to carry out an inquiry under s. 5 of the Act and it is for him to decide whether to exercise any of the powers in s. 5 of the Act. However, the result of his inquiry as spelt out in s. 5(2) of the Act must be in a report as stipulated in s. 5(4) of the Act. Thus, there must be evidence on record to show that the IO had complied with the requirements of s. 5 of the Act. In this case, no evidence had been tendered by the IO in support of the role played by him. Neither was there any evidence to show that a claim to privilege had been made under s. 14 of the Act to justify the non-production of such evidence. There was, therefore, an obligation on the respondents to produce such evidence as the appellant was entitled to it. (paras 4 & 5)

(1a) Paragraph 6 of the affidavit of the Minister merely stated that he considered the report of the IO. It did not reveal whether the IO had complied with the requirements of s. 5 of the Act and, in particular, his conclusion under s. 5(2) of the Act. His conclusion would be very significant since it would certainly play a critical role in the decision to be made by the Minister, as he was an independent person with a legal background. Similarly, para. 6 also did not state the qualifications of the IO. The requirement under s. 5(1) of the Act for the IO to be a non-police officer who is legally qualified is to ensure that the person who conducts the

A inquiry is one who is independent and has sufficient knowledge of the law to prepare a proper report for consideration by the Minister. Again, there was no evidence on record to show compliance with this requirement. There was, therefore, a breach in relation to compliance with s. 5 B of the Act. (para 5)

(2) The test in determining whether a breach can be subjected to judicial review is whether it is in compliance with any procedural requirement governing any act done or decision C made by the Yang di-Pertuan Agong or the Minister, in the exercise of their discretionary power in accordance with the Act without the need to establish any prejudice. Such a determination will be greatly facilitated, although not decisively, by a consideration of the effect of the statutory D provision that has been breached, that is to say, whether it is mandatory or directory in nature. (para 8)

(2a) The short answer to the reliance of the DPP on *Mohd Faizal (supra)* was that the *ratio decidendi* of that case did not deal with defects in the making of the current detention E order but with the illegality of the prior detention. Thus, it only rendered irrelevant defects in a prior detention when the current detention order was lawful. The appellant's challenge in this case was not as to the validity of the prior arrest but as to the regularity of the current detention order F in the light of the defects in the procedure leading to the making of the order. The authority relied on could not, therefore, be used as a shield to hide from procedural defects in the making of the current detention order. (para 9) G

(2b) The reports specified in s. 6(1)(a) and (b) of the Act play a very significant role in the making of a detention order against a person and the Minister must consider these reports before making a detention order. They are therefore H pre-conditions to the exercise of power under s. 6(1) of the Act and are part of the decision-making process and not the decision itself. Thus, they amount to procedural requirements governing the exercise of discretion by the Minister in making a detention order within the meaning of s. 11C of I the Act, and a breach of this requirement is hence subject to judicial review. Therefore, if a report must be considered

before making a detention order, it must be one that is in regular form. It follows that the report of the IO that the Minister must consider under s. 6(1)(b) of the Act must be one that has satisfied the requirements of s. 5 of the Act. Since there was no evidence of compliance with s. 5 of the Act in this case, the report under s. 6(1)(b) of the Act could not be said to have been made in accordance with law. Accordingly, the detention order made against the appellant could not be said to be one that had been validly made. (para 9)

Bahasa Malaysia *translation of headnotes*

Perayu telah ditahan di bawah s. 3(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta') dan berikutnya Timbalan Menteri Keselamatan Dalam Negeri telah mengeluarkan perintah tahanan terhadap perayu di bawah s. 6(1) Akta. Writ *habeas corpus* yang dfailkan perayu telah ditolak oleh Mahkamah Tinggi, sekaligus menyebabkan rayuan di sini. Dalam *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors*, mahkamah ini memutuskan bahawa suatu writ *habeas corpus* hendaklah dituju kepada perintah tahanan semasa jika ia dibuat selepas satu penangkapan dan penahanan terdahulu. Ertinya, sebarang ketaksahan pada penangkapan dan penahanan terdahulu tidak boleh menjadi halperkara siasatan. Isu kritikal yang berbangkit untuk keputusan dalam rayuan ini adalah sama ada akibat yang serupa akan menimpa ketidakteraturan yang berlaku semasa pembuatan perintah tahanan semasa, atau, dalam perkataan lain, sama ada apa jua pra-syarat statutori kepada pembuatan perintah tahanan semasa atau yang membawa kepada perintah itu, tidak boleh disiasat sepertimana halnya dengan ketidakteraturan pada penangkapan dan penahanan terdahulu. Perayu berhujah bahawa tiada keterangan material pada rekod yang menunjukkan kelayakan Pegawai Penyiasat ('IO') sebagaimana yang ditetapkan oleh proviso s. 5(1) Akta, dan tidak juga terdapat keterangan yang menunjukkan bahawa IO telah menjalankan siasatan yang ditugaskan kepadanya. IO tidak mengesahkan apa-apa afidavit bagi menjelaskan apakah peranan yang dimainkan olehnya. Dalam jawapannya, yang arif Timbalan Pendakwa Raya ('DPP') menegaskan bahawa perenggan 6 afidavit Menteri menunjukkan bahawa IO telah sebenarnya menyediakan laporan sepertimana yang dikehendaki darinya. Beliau menambah bahawa, mengambilkira penghakiman mahkamah ini

dalam *Mohd Faizal (supra)*, sebarang kecacatan pada laporan IO mahupun pada kelayakan beliau bukanlah perkara yang relevan untuk dipertimbangkan.

Diputuskan (membenarkan rayuan)
Oleh Augustine Paul HMP:

(1) Tidak menjadi kewajipan bagi IO untuk menjalankan siasatan di bawah s. 5 Akta dan terpulanglah kepadanya sama ada untuk melaksanakan kuasa-kuasa yang tersenarai dalam seksyen tersebut. Bagaimanapun, keputusan siasatannya seperti yang diperkatakan oleh s. 5(2) Akta hendaklah dalam bentuk laporan dan selaras dengan ketetapan s. 5(4) Akta. Dengan itu, harus ada keterangan pada rekod yang menunjukkan bahawa IO telah mematuhi kehendak-kehendak s. 5 Akta. Dalam kes semasa, tiada keterangan dikemukakan oleh IO bagi menyokong peranan yang dimainkan beliau. Tidak juga ditunjukkan bahawa tindakan dibuat bagi menuntut keistimewaan di bawah s. 14 Akta bagi menjustifikasikan kegagalan mengemukakan keterangan berkenaan. Jelasnya, responden bertanggungan untuk mengemukakan keterangan yang berkaitan kerana perayu berhak kepadanya.

(1a) Perenggan 6 afidavit Menteri hanya menyatakan bahawa beliau telah mempertimbang laporan IO. Ia tidak menyatakan sama ada IO telah mematuhi kehendak-kehendak s. 5 Akta, terutama konklusinya yang dibuat di bawah s. 5(2) Akta. Konklusi tersebut penting kerana peranan beliau adalah kritikal dalam keputusan yang dibuat oleh Menteri, memandangkan IO seorang yang bebas dan mempunyai latarbelakang perundangan. Perenggan 6 juga tidak menyatakan kelayakan IO. Syarat s. 5(1) Akta bahawa IO tidak boleh terdiri dari pegawai polis dan perlu mempunyai kelayakan undang-undang adalah untuk memastikan bahawa orang yang menjalankan siasatan adalah seorang yang bebas dan mempunyai pengetahuan yang mencukupi mengenai undang-undang bagi membolehkannya menyediakan laporan yang sesuai untuk pertimbangan Menteri. Sekali lagi, tiada keterangan pada rekod yang menunjukkan pematuhan kepada syarat ini. Oleh itu, terdapat pelanggaran terhadap kehendak s. 5 Akta.

(2) Ujian bagi menentukan sama ada sesuatu pelanggaran itu akan tertakluk kepada semakan kehakiman adalah sama ada ianya mematuhi mana-mana syarat prosedur yang mengawal selia tindakan atau keputusan yang dibuat oleh Yang di-Pertuan Agong atau Menteri dalam pelaksanaan kuasa budibicara mereka menurut Akta, tanpa perlu membuktikan sebarang prejudis. Dalam penentuan ini, pertimbangan terhadap kesan peruntukan statutori yang dilanggar adalah membantu, walaupun tidak sepenuhnya, iaitu sama ada ianya bersifat mandatori ataupun direktori.

(2a) Jawapan pendek kepada kebergantungan DPP ke atas kes *Mohd Faizal (supra)* adalah bahawa *ratio decidendi* kes itu tidak menyentuhi persoalan tentang kecacatan dalam membuat perintah tahanan semasa sebaliknya menyentuhi tentang sah atau tidaknya penahanan terdahulu. Ia menjadikan kecacatan di penahanan terdahulu sebagai tidak relevan jika perintah tahanan semasa adalah sah. Cabaran perayu di sini bagaimanapun bukan mengenai kesahan penangkapan terdahulu, tetapi mengenai keteraturan perintah tahanan semasa dengan mengambilkira kecacatan yang ada pada proses yang membawa kepada pembuatan perintah tersebut. Autoriti yang disandarkan, dengan itu, tidak boleh menjadi perisai untuk menangkis kecacatan prosedur pada pembuatan perintah tahanan semasa.

(2b) Laporan yang disebut secara khusus di dalam s. 6(1)(a) dan (b) Akta memain peranan penting dalam pembuatan perintah tahanan terhadap seseorang dan Menteri hendaklah mempertimbang laporan tersebut sebelum membuat perintah tahanan. Ini adalah pra-syarat kepada pelaksanaan kuasa di bawah s. 6(1) Akta dan merupakan sebahagian dari proses membuat keputusan dan bukan sebahagian keputusan itu sendiri. Oleh itu, ia menjadi satu syarat prosedur yang mengawal pelaksanaan budibicara Menteri dalam membuat perintah tahanan dalam maksud s. 11C Akta, dan pelanggaran syarat ini adalah tertakluk kepada semakan kehakiman. Dengan itu juga, jika laporan harus dipertimbang sebelum membuat sesuatu perintah tahanan, ia mestilah dalam bentuknya yang teratur. Ianya mengikut bahawa laporan yang perlu dipertimbang oleh Menteri di bawah s. 6(1)(b) Akta hendaklah sesuatu yang memenuhi kehendak s. 5 Akta.

Dalam kes ini, oleh kerana tiada bukti tentang pematuhan kepada s. 5 Akta, maka laporan di bawah s. 6(1)(b) Akta tidak boleh dianggap sebagai telah dibuat dengan teraturnya mengikut undang-undang. Dengan itu, perintah tahanan yang dibuat terhadap perayu tidak boleh dikatakan sebagai dibuat dengan secara sah.

Case(s) referred to:

Aw Ngoh Leang v. Inspector General of Police [1993] 1 CLJ 373 SC ***(refd)***
Inspector General of Police & Ors v. Rajoo Ramasamy [1989] 1 CLJ 1039; [1989] 1 CLJ (Rep) 45 SC ***(refd)***
Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Ors [1992] 2 CLJ 1037; [1992] 2 CLJ (Rep) 816 HC ***(refd)***
Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 4 CLJ 613 FC ***(dist)***
Munna Tuin v. District Magistrate, Lucknow [1982] Cr LJ 630 ***(refd)***
Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649 HC ***(refd)***
Re Datuk James Wong Kim Min [1976] 2 MLJ 245 ***(refd)***
Re Tan Boon Liat [1977] 2 MLJ 108 ***(refd)***
The Reverend Thomas Pelham Dale's case [1881] 6 QBD 376 ***(refd)***

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(1), 5(1), (2), (4), 6(1)(a), (b), 11C(1), 14
Federal Constitution, art. 5(2)

For the appellant - RR Mahendran; M/s RR Mahendran & Co
For the respondents - Tengku Amir Zaki Tengku Hj Abdul Rahman

[Appeal from High Court, Johor Bahru; Criminal Application No: MT 1-44-13-2005]

Reported by Suresh Nathan

JUDGMENT

Augustine Paul JCA:

[1] In *Mohd Faizal bin Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613 this court held that a writ of *habeas corpus* must be directed against the current detention order when it has been made subsequent to a prior arrest and detention. Thus any illegality in the prior arrest and detention cannot be the subject matter of inquiry. The critical issue that

arose for determination in this appeal before us was whether such a result would also extend to any irregularities in the making of the current detention order. In other words, does it mean that any statutory pre-condition to the making or leading to the making of the current detention order cannot be inquired into just as in the case of irregularities in the prior arrest and detention?

[2] The appellant was arrested on 15 June 2004 pursuant to s. 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ("the Act"). The Deputy Minister of Internal Security issued a detention order against the appellant on 13 August 2004 under s. 6(1) of the Act. The writ of *habeas corpus* filed by the appellant on 11 March 2005 was dismissed by the High Court on 20 February 2006. This appeal is by the appellant. In order to appreciate the argument raised before us by both parties it is necessary to reproduce some parts of the affidavits filed by them. Paragraph 6 of the affidavit affirmed by the Deputy Minister of Internal Security on 17 August 2005 reads as follows:

> Daripada laporan lengkap penyiasatan yang berkaitan dengan aktiviti Pemohon yang telah saya terima daripada CIF INSPEKTOR ISMAIL BIN AHMAD iaitu Pegawai Penyiasat Polis di bawah Seksyen 3(3) Akta tersebut pada 26.7.2004 mengenai tangkapan dan penahanan Pemohon dan juga laporan oleh ADNAN BIN YA'ACOB iaitu Pegawai Siasatan di bawah Seksyen 5(4) Akta tersebut pada 3.8.2004, saya berpuashati bahawa Pemohon pernah ada atau sedang ada kaitan dengan aktiviti pengedaran dadah berbahaya dan adalah perlu bagi ketenteraman awam supaya Pemohon ditahan.

In reply to this affidavit the appellant affirmed an affidavit-in-reply on 1 September 2005. Paragraph 5 of this affidavit reads as follows:

> Saya merujuk kepada perenggan 6 Afidavit Responden Pertama dan sesungguhnya percaya bahawa pegawai siasatan di bawah Seksyen 5(4) Akta tersebut tidak layak menjadi pegawai siasatan di bawah Seksyen 5 Akta tersebut. Selebihnya pegawai siasatan tersebut tidak melaksanakan segala kewajiban dan tanggungjawab di bawah Seksyen 5 Akta tersebut, maka lapuran pegawai siasatan tidak lengkap dan tidak teratur. Responden Pertama telah mendasarkan Perintah Tahanan di bawah Seksyen 6(1) di atas lapuran pegawai siasatan yang defektif.

[3] The submission advanced by learned counsel before us stems from s. 5 of the Act. It reads as follows:

> 5. (1) There shall be appointed by the Minister in writing such number of Inquiry Officers as may be necessary for the purposes of this Act:
>
> Provided that no police officer nor any person who is not legally qualified shall be appointed to be an Inquiry Officer.
>
> (2) Upon receiving the report under subsection (3) of section 3, the Inquiry Officer shall inquire whether there are reasonable grounds for believing that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs.
>
> (3) An Inquiry Officer may, in his discretion, for the purpose of subsection (2) -
>
> (a) require the attendance before him of a person detained under section 3;
>
> (b) procure and receive all such evidence, whether oral or in writing and whether the same be admissible or not under any written law for the time being in force relating to evidence or criminal procedure, which he may think necessary or desirable;
>
> (c) summon and examine witnesses on oath or affirmation, and may for those purposes administer any oath or affirmation;
>
> (d) require the production of any document or other thing in his opinion relevant to the case.
>
> (4) An Inquiry Officer shall submit his report in writing to the Minister within such period as may be prescribed by the Minister by regulations made under this Act.

Learned counsel argued that there is no material on record to show the qualification of the inquiry officer as prescribed by the proviso to s. 5(1) of the Act. Neither was there any evidence to show that the inquiry officer carried out the investigation as required of him. He did not affirm any affidavit to explain the part played by him. In his reply the learned Deputy Public Prosecutor said that para. 6 of the affidavit of the Deputy Minister of Internal Security shows that the inquiry officer had indeed prepared the report as required by s. 5 of the Act. He added that in view of

the judgment of this court in *Mohd Faizal bin Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613 any defect in the report of the Inquiry Officer or in his qualification is not a relevant matter for consideration.

[4] In substance the submission of learned counsel was that there has been no compliance with the requirements of s. 5 of the Act. Section 6(1) of the Act states in unmistakable terms that the Minister must consider, *inter alia*, the report of the inquiry officer before making the detention order. The report must be one that is prepared in accordance with the requirements of s. 5 of the Act. It therefore becomes necessary to consider the duties and responsibilities of an inquiry officer. This was considered by the (then) Supreme Court in *Inspector General of Police & Ors v. Rajoo s/o Ramasamy* [1989] 1 CLJ 1039; [1989] 1 CLJ (Rep) 45 where Abdul Hamid LP said:

> Fundamentally, the learned judge came to that conclusion on the strength of the words 'shall inquire' appearing in s. 5(2). But where he went wrong was that he completely omitted to consider the opening words of sub-s (3) which reads:
>
> > An Inquiry Officer may, in his discretion, for the purpose of sub-s 2:
> >
> > (a) require ...
>
> These words were crucial to a proper interpretation of the meaning of 'inquiry' under s 5(2) of the Act.
>
> If the learned judge had given due regard to these words, he would not, in our view, have come to the conclusion that he did. The language used in s 5 of the Act is crystal clear.
>
> In our view, the words used in sub-s (2) read in the light of the whole of sub-s (3) make it abundantly clear that discretion rests with the inquiry officer. It is for the inquiry officer in a particular case to decide whether to exercise any of the powers. In other words it is for the inquiry officer to decide whether, for the purpose of the inquiry, to invoke any of the powers in the relevant paragraphs. Whether there is a need to do so would depend primarily on whether, having regard to the complete report submitted to him by the police investigating officer and on the materials submitted, he could be satisfied there were reasonable grounds to found his belief. If any inquiry officer is satisfied, after examining and considering the materials contained in the complete

A report, that there are reasonable grounds for believing that such person has been or is associated with trafficking activities, the need to call any witness or to procure any document does not arise. It is therefore only in cases where the inquiry officer, on the materials contained in the report submitted to him, is unable to satisfy himself that there are reasonable grounds to found his belief that such person is associated in trafficking activities, that the need to exercise his discretion arises. It would perhaps be proper to say that he ought to exercise the discretion if it is only by so doing that he can properly decide.

In our judgment, therefore, the learned judge erred in law in holding that it is imperative for the inquiry officer to invoke the powers contained in the relevant paragraphs to constitute a valid inquiry under sub-s (2) of s 5 of the Act. The duty is that of the inquiry officer to be satisfied that there are reasonable grounds for believing that the person has been or is associated with trafficking activities. In carrying out his duty he has a discretion whether or not to call witnesses. And it is not mandatory that he should invoke the powers contained in sub-s (3) of s 5 of the Act.

It is clear from the above passage that it is not mandatory for the inquiry officer to carry out an inquiry under s. 5 of the Act. It is for him to decide whether to exercise any of the powers in s. 5 of the Act. However, the result of his inquiry as spelt out in s. 5(2) of the Act must be in a report as stipulated in s. 5(4) of the Act. In *Munna Tuin v. District Magistrate, Lucknow* [1982] Cr LJ 630 it was held that failure to supply the inquiry report on which reliance was placed by the detaining authority to the detainee was fatal. The need for this becomes particularly significant in this case in view of the objection raised by learned counsel. Thus there must be evidence on record to show that the inquiry officer had complied with the requirements of s. 5 of the Act. The evidence of the inquiry officer could be in the form of an affidavit affirmed by him or by the production of his report itself. The disclosure of such evidence is, of course, subject to s. 14 of the Act. In that event a statement by the Minister that he had considered the report of the duly appointed inquiry officer would be sufficient.

[5] In this case no evidence has been tendered by the inquiry officer in support of the role played by him. Neither is there any evidence to show that a claim to privilege has been made under s. 14 of the Act to justify the non-production of such evidence.

There is therefore an obligation on the respondents to produce such evidence as the appellant is entitled to it. Paragraph 6 of the affidavit of the Deputy Minister of Internal Security reproduced earlier merely states that he considered the report of the inquiry officer. It does not reveal whether the inquiry officer had complied with the requirements of s. 5 of the Act and, in particular, his conclusion under s. 5(2) of the Act. His conclusion will be very significant as it would certainly play a critical role in the decision to be made by the Minister as he is an independent person with a legal background. Similarly para. 6 of the affidavit of the Deputy Minister of Internal Security also does not state the qualifications of the inquiry officer. The requirement under s. 5(1) of the Act for the inquiry officer to be a non-police officer who is legally qualified is to ensure that the person who conducts the inquiry is one who is independent and has sufficient knowledge of the law to prepare a proper report for consideration by the Minister. Again there is no evidence on record to show compliance with this requirement. There is therefore a breach in relation to compliance with s. 5 of the Act.

[6] The resultant matter for consideration is whether the breach is subject to judicial review. The detention order against the appellant was issued by the Deputy Minister of Internal Security pursuant to s. 6(1) of the Act which reads as follows:

> 6. (1) Whenever the Minister, after considering:
>
> (a) the complete report of investigation submitted under subsection (3) of section 3; and
>
> (b) the report of the Inquiry Officer submitted under subsection (4) of section 5,
>
> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years.

It is manifestly patent that the Minister may make a detention order under s. 6(1) of the Act only when he is satisfied of the need to do so after he had considered the two reports specified in s. 6(1)(a) and (b) of the Act. What now requires to be addressed is the power of the court to review the validity of a detention order issued under s. 6(1) of the Act when there are defects in the reports that the Minister must consider before making the order.

[7] The very object of a writ of *habeas corpus* is to secure the release of a person who has been unlawfully detained. This would as of necessity require a consideration by the court of the lawfulness or otherwise of a detention. As a matter of fact this power of the court is enshrined in art. 5(2) of the Federal Constitution which reads as follows:

> Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

Needless to say, the lawfulness of a detention would be dependent on the law in force from time to time. In dealing with the duty of the court in cases of preventive detention Lee Hun Hoe CJ (Borneo) said in *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 at p 251:

> Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. See *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184.

> One of the functions of the courts is to interpret the law. An inherent part of their function is to see that the executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject. In fact, Article 5(1) of the Constitution guarantees that 'no person shall be deprived of his ... liberty except in accordance with the law.' If this constitutional guarantee is to have any real meaning at all, then it is imperative that the courts should intervene whenever the liberty of the subject is encroached upon not in accordance with the law.

Further reference may be made to *Re Tan Boon Liat* [1977] 2 MLJ 108 where Lee Hun Hoe CJ (Borneo) said at p 110-111:

> In *The Reverend Thomas Pelham Dale's Case* [1881] 6 QBD 376, 461, 469 and 470 Brett LJ observed at page 461 that:
>
> > Then comes the question upon the *habeas corpus*. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue.
>
> Cotton LJ in supporting this stated at page 469:
>
> > I quite agree with Brett LJ, that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form. Here, however, the departure from the correct procedure is not, in my opinion, a mere matter of form, but is a matter of substance.

[8] It follows that if a detention is procured by steps which are not regular the court is empowered to set aside the detention order. It means that every step which is necessary for the making of a detention order is subject to review by the court. The effect of a breach of such procedural requirements had been considered in a number of cases. See, for example, *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649; *Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Others* [1992] 2 CLJ 1037; [1992] 2 CLJ (Rep) 816 and *Aw Ngoh Leang v. Inspector General of Police* [1993] 1 CLJ 373. It has been recognised in these cases that a procedural

A requirement may be mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice. The breach of a
B procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee. However it must be observed that the power of the court to intervene is limited to only matters of compliance with procedural requirements
C by s. 11C(1) of the Act which reads as follows:

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this
D Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

It is clear that the section restricts judicial review to only questions on compliance with any procedural requirement governing any act
E done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power. Such procedural requirements can only be ones that will go to the root of the matter and be of direct relevance to the making of the detention order. The section only refers to a question of
F compliance with procedural requirements without subjecting it to any prejudice having been suffered. The test, therefore, in determining whether a breach can be subjected to judicial review is whether it is in compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan
G Agong or the Minister in the exercise of their discretionary power in accordance with the Act without the need to establish any prejudice. Such a determination will be greatly facilitated, though not decisively, by a consideration of the effect of the statutory provision that has been breached, that is to say, whether it is
H mandatory or directory in nature.

[9] It must be reiterated that the reports that the Minister must consider are only a prerequisite to the making of a detention order under s. 6(1) of the Act. Accordingly, the short answer to the
I reliance of the learned Deputy Public Prosecutor on the judgment of this court in *Mohd Faizal bin Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613 is that the *ratio decidendi*

of that case does not deal with defects in the making of the current detention order but with the illegality of the prior detention. Thus it only renders irrelevant defects in a prior detention when the current detention order is lawful. The challenge of the appellant in this case is not as to the validity of the prior arrest but as to the regularity of the current detention order in the light of defects in the procedure leading to the making of the order. The authority relied on cannot therefore be used as a shield to hide from procedural defects in the making of the current detention order. The reports specified in s. 6(1)(a) and (b) of the Act play a very significant role in the making of a detention order against a person. The Minister must consider these reports before making a detention order. They are therefore pre-conditions to the exercise of power under s. 6(1) of the Act. They are part of the decision making process and not the decision itself. Thus they amount to procedural requirements governing the exercise of discretion by the Minister in making a detention order within the meaning of s. 11C of the Act. A breach of this requirement is therefore subject to judicial review. The case of *The Reverend Thomas Pelham Dale's case* [1881] 6 QBD 376 cited in *Re Tan Boon Liat* [1977] 2 MLJ 108 referred to earlier makes it clear that the steps taken to detain a person must be entirely regular. Thus if a report must be considered before making a detention order it must be one that is in regular form. It follows that the report of the inquiry officer that the Minister must consider under s. 6(1)(b) of the Act must be one that has satisfied the requirements of s. 5 of the Act. Since there is no evidence of compliance with s. 5 of the Act in this case the report under s. 6(1)(b) of the Act cannot be said to have been made in accordance with law. Accordingly, the detention order made against the appellant cannot be said to be one that has been validly made.

[10] In the upshot we allowed the appeal by the appellant.